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No. 96-779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, CORPORATION FOR PUBLIC BROADCASTING, PUBLIC BROADCASTING SERVICE, AND ORGANIZATION OF STATE BROADCASTING EXECUTIVES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a state-affiliated public broadcast licensee's nonpartisan decision to host a debate between newsworthy congressional candidates creates a First Amendment right of access by all legally qualified candidates under the public forum doctrine.

2. Whether the good faith exercise of editorial discretion by a state-affiliated public broadcast licensee, protected by the Communications Act of 1934, as amended, enables the licensee to host a debate between only newsworthy candidates, even if the debate is found to be a limited public forum.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. A CANDIDATE DEBATE SPONSORED BY A PUBLIC TELEVISION STATION IS NOT A LIMITED PUBLIC FORUM FOR FIRST AMENDMENT PURPOSES	5
A. A Broadcaster's Decision To Sponsor A Debate Between Selected Candidates For Office Does Not Evince An Intent To Create An Open Forum For All Candidates To Express Their Views	6
B. The FCC's Longstanding Interpretation Of The Communications Act's Equal Opportunity Requirement Confirms That A Broadcaster's Selection Of Debate Participants Is A Legitimate Exercise Of News Judgment	11
C. The Eighth Circuit Holding Will Sharply Limit Public Broadcasters' Sponsorship Of Candidate Debates And Other Political News Coverage	14
D. The Eighth Circuit's Public Forum Holding Destroys The Ability Of State-Owned Broadcasters And Publishers To Make Necessary Editorial Decisions	19

TABLE OF CONTENTS -- Continued

	Page
II. EVEN IF DEBATES ARE HELD TO BE LIMITED PUBLIC FORUMS, PUBLIC BROADCAST LICENSEES SUCH AS AETN MAY MAKE REASONABLE JOURNALISTIC CHOICES IN PRESENTING THEM	20
A. The Government Is An Important Participant In The Marketplace Of Ideas	21
B. As A Broadcast Licensee, AETN's Exercise Of Editorial Discretion Is Supported By Public Interest Rights And Responsibilities	23
1. The Public Interest Standard Is Grounded In First Amendment Principles	24
2. The Same Public Interest Principles Apply With Equal Force To State-Owned Broadcast Licensees	25
C. AETN's Editorial Choice In This Case Should Be Upheld	27
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES:

Allston v. *Lewis*, 480 F. Supp. 328 (D.S.C. 1979), *aff'd*, 688 F.2d 829 (4th Cir. 1982) 20

American Party of Texas v. *White*, 415 U.S. 767 (1974) 22, 23

Avins v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 930 (1968) 19

Barnard v. *Chamberlain*, 897 F.2d 1059 (10th Cir. 1990) 19

Block v. *Meese*, 793 F.2d 1303 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986) 21

Board of Educ., Island Trees Union Free Sch. Dist. v. *Pico*, 457 U.S. 853 (1982) 21, 23

Buckley v. *Valeo*, 424 U.S. 1 (1976) 22, 28

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Cafeteria & Restaurant Workers, Local 473 v. *McElroy*, 367 U.S. 886 (1961) 8

Calash v. *City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986) 10

Capitol Square Review & Advisory Bd. v. *Pinette*, 115 S. Ct. 2440 (1995) 6

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CBS, Inc. v. *FCC*, 453 U.S. 367 (1981) 9, 24, 25

Chandler v. *Georgia Public Telecomm. Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991) ..... *passim*

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TABLE OF AUTHORITIES -- Continued

Page

CASES (continued):

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Cornelius v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) 6, 7, 8

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Healy v. *James*, 408 U.S. 169 (1972) 10

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Jenness v. *Fortson*, 403 U.S. 431 (1971) 22, 28

Kennedy for President Comm. v. *FCC*, 636 F.2d 417 (D.C. Cir. 1980) 12

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TABLE OF AUTHORITIES -- Continued

Page

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Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) 6, 7, 8

Marcus v. *Iowa Pub. Television*, 97 F.3d 1137 (8th Cir. 1996) 27, 30

Meese v. *Keene*, 481 U.S. 465 (1987) 21

Muir v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) ..... *passim*

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Storer v. *Brown*, 415 U.S. 724 (1974) 22

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TABLE OF AUTHORITIES -- Continued

Page

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10 Ill. Comp. Stat. Ann. 5/10-3 16

44 U.S.C. § 1108 21

47 U.S.C. § 153(10) 9

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47 U.S.C. § 312(a)(7) 24, 28

47 U.S.C. § 315(a) 11, 24

47 U.S.C. § 315(a)(1)-(4) 11

47 U.S.C. § 315(b) 24

47 U.S.C. § 326 24

47 U.S.C. § 396 2

47 U.S.C. § 396(a)(10) 27

47 U.S.C. § 396(c)-(f) 27

47 U.S.C. § 396(f)(3) 27

47 U.S.C. § 396(k)(6)(A)-(B) 27

Alaska Stat. § 15.40.190 16

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Ark. Code Ann. § 7-7-103(c)(1) 3

TABLE OF AUTHORITIES -- Continued

Page

STATUTES (continued):

Ark. Code Ann. § 7-7-103(d)(1) 16
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Ga. Code Ann. § 20-13-5(a) 10
Ga. Code Ann. § 21-2-170(b) 16
Idaho Code § 34-708(2)(a), (b) 16
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Iowa Code Ann. § 45.1(1), (2) 16
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Ky. Rev. Stat. Ann. § 118.315(2) 16
Mass. Gen. Laws Ann. ch. 53, § 6 16
Mich. Comp. Laws § 168.590b(2) 16
Minn. Stat. Ann. § 204B.08 subd. 3(a) 16
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Neb. Rev. Stat. § 32-618(c) 16
Nev. Rev. Stat. § 293.200(1)(b) 16
Okla. Stat. Ann. tit. 26, § 5-112 15
Or. Rev. Stat. § 249.740(1) 16
Public Broadcasting Act of 1967, 47 U.S.C. §§ 390-399 2
R.I. Gen. Laws § 17-14-7(a), (b) 16
R.I. Gen. Laws § 17-14-7(d), (e) 16
S.D. Codified Laws § 12-7-1 16

TABLE OF AUTHORITIES -- Continued

Page

STATUTES (continued):

Tenn. Code Ann. § 2-5-101(b)(1) 15
Utah Code Ann. § 20A-9-502(2)(a)(i), (ii) 16
Va. Code Ann. § 24.2-506(3), (4) 16
Vt. Stat. Ann. tit. 17, § 2402(b)(2), (3) 16
W. Va. Code § 3-5-23(c) 16

ADMINISTRATIVE MATERIALS:

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Carl E. Person, Esq., 6 F.C.C.R. 7477 (1991) 13
City of New York Mun. Broad. Sys., 56 F.C.C.2d 169 (1975) 25
Cyril E. Sagan, 1 F.C.C.R. 10 (1986) 13
Fox Broad. Co., 11 F.C.C.R. 11,101 (1996) ... 11, 14, 15
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Jim Trinity, 7 F.C.C.R. 3199 (1992) 12
John W. Spring, 1 F.C.C.R. 589 (1986) 13
Kennedy for President Comm., 77 F.C.C.2d 964, *aff'd, Kennedy for President Comm.* v. *FCC*, 636 F.2d 417 (D.C. Cir. 1980) 12
King Broad. Co., 6 F.C.C.R. 4998 (1991) 12
Lenora B. Fulani, 3 F.C.C.R. 6245 (1988) 13
Mitchell Rogovin, Esq., 7 F.C.C.R. 1780 (1992) 13

TABLE OF AUTHORITIES -- Continued

Page

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TABLE OF AUTHORITIES -- Continued

Page

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici the Association of America's Public Television Stations ("APTS"), the Corporation for Public Broadcasting ("CPB"), the Public Broadcasting Service ("PBS"), and the Organization of State Broadcasting Executives ("OSBE")

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part and no person, other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

collectively provide representation, programming, program distribution, related services, and financial support to the Nation's public television and radio stations -- two thirds of which, like the petitioner in this case, are licensed to state or local government entities or state universities.[2]

APTS and PBS are nonprofit membership organizations whose members collectively include 175 licensees representing approximately 350 public television stations in all 50 states. OSBE is a membership organization composed of the chief executives of television and radio stations licensed to state and local government entities. CPB is a nonprofit corporation authorized by the Public Broadcasting Act of 1967, 47 U.S.C. §§ 390-399, to allocate federal funds to promote public television and radio broadcasting in the United States. *Id.* § 396.

As discussed more fully below, the state-owned broadcast stations that amici represent and support are substantially and adversely affected by the Eighth Circuit ruling. The lower court decision sharply limits public broadcasters' ability to sponsor candidate debates that, in the broadcasters' good faith editorial judgment, will best serve the public interest. If affirmed, the decision could have a devastating effect on public broadcasters' coverage of federal, state, and local elections throughout the country.

This brief is filed with the consent of the parties. Consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from the Eighth Circuit Court of Appeals' holding that a debate between the Republican and Democratic candidates for an Arkansas congressional seat sponsored by the Arkansas Educational Television Commission ("AETC") to be aired on the Arkansas Educational Television Network ("AETN")[3] was a limited public forum for First Amendment

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[2] Not all noncommercial broadcast stations are licensed to governmental bodies, but for purposes of reference herein, such stations generally will be labeled public broadcast stations.

[3] AETN is the public television network of the State of Arkansas. It is governed by AETC, an agency of the State of Arkansas. For

purposes. The lower court held that the First Amendment prohibited AETN from excluding perennial candidate Ralph P. Forbes from the televised debate based on the station's good faith editorial judgment that -- in light of a number of factors, including Forbes' lack of public support and prior press coverage and the very low likelihood that he would win the election -- its viewers' interests would best be served by a debate between the two leading, major-party candidates.[4]

Under Arkansas law, a candidate needs only 2,000 petition signatures to secure a place on the congressional ballot. Ark. Code Ann. § 7-7-103(c)(1). It is undisputed in this case that, although Forbes attained ballot status, he had no other indicia of voter interest. J.A. 91-97, 106-107. At trial, the jury found in response to special interrogatories that AETN's decision not to include Forbes in the debate did not result from political pressure and was not motivated by disagreement with Forbes' views. Pet. App. 4a, 22a-23a.

Even the court of appeals agreed that AETN's judgment "was made in good faith" and involved "exactly the kind of journalistic judgment routinely made by newspeople." *Id.* at 16a. Nevertheless, the court characterized the exclusion of any candidate who attains ballot status as a bureaucratic "ipse dixit" and held that each legally qualified candidate has a First

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convenience, this brief refers to actions of both AETC and AETN as actions of AETN.

[4] Between 1985 and 1992, Forbes ran unsuccessfully for the U.S. Senate, the House of Representatives, Lieutenant Governor of Arkansas (twice) and a local school board. J.A. 199; Tr. 144-146. The Executive Director of AETN, who was ultimately responsible for the decision not to include Forbes in the debate, J.A. 108, testified that among the factors that influenced her were that Forbes had no campaign headquarters other than his own house; he had no paid campaign staff; he had little financial support, as evidenced by his failure to report his campaign finances to appropriate authorities; election night reporting services did not even plan to run his name in their results; and he was currently receiving little if any news coverage. *Id.* at 126-127.

"J.A." refers to the Joint Appendix filed in this Court. "Tr." refers to the trial transcript. "Pet. App." refers to the appendix filed with the Petition for Writ of Certiorari.

Amendment right to compel access to debates on public broadcast stations, *id.* at 15a -- regardless of how little public interest some candidacies have generated, or how the resulting cacophony of voices will distract from the issues that are important to most voters. In fact, the court implicitly held that all candidates on the ballot must be allowed to debate even if there are so many such candidates that a debate cannot realistically be held.

SUMMARY OF ARGUMENT

The Eighth Circuit holding that a public broadcaster-sponsored candidate debate constitutes a limited public forum is plainly wrong. Under this Court's precedents, the government creates a limited public forum only when it intentionally opens a forum for unrestricted expression by the public or some segment of the public. Broadcasters' facilities and their programs clearly do not meet this standard, as every other court of appeals to address the issue has held.

Broadcasters -- both public and private -- are statutorily required to serve the public interest and are authorized to make journalistic judgments in determining the content of their programs. When a broadcast station makes a good faith decision to invite those candidates who are most newsworthy to appear in a debate, it is exercising that journalistic discretion and not providing an "open microphone" for all candidates.

The Eighth Circuit's contrary conclusion contravenes twenty years of Federal Communications Commission and judicial precedent under the Communications Act holding that broadcaster-sponsored debates are "bona fide news events" and permitting broadcasters to determine what debate format will best serve the public interest in a particular case. The lower court holding, if affirmed, will sharply restrict public broadcasters' ability to sponsor candidate debates and provide other campaign news coverage. It effectively destroys the ability of public broadcasters -- and indeed all government-owned publishers -- to make necessary editorial choices.

Even if candidate debates are labeled limited public forums, moreover, this Court's precedents require that their constitutionality be measured against both the legal

framework in which broadcasters operate and the function that televised debates are intended to serve. Properly viewed in this context, the debate at issue here was clearly permissible.

This Court has long recognized that the government may "speak" in many ways, including by subsidizing the speech of others -- for example, by providing funding for political candidates. When it does so, it is not required to fund every candidate, so long as its choices are not viewpoint discriminatory. The legitimacy of the government's selection of voices depends upon the particular context in which it is made. When, as here, a public broadcaster with a statutory obligation to serve the public interest makes a good faith editorial decision to present a debate between the candidates who are of interest to most viewers, that decision is clearly appropriate and should be upheld.

ARGUMENT

I. A CANDIDATE DEBATE SPONSORED BY A PUBLIC TELEVISION STATION IS NOT A LIMITED PUBLIC FORUM FOR FIRST AMENDMENT PURPOSES

AETN made a journalistic decision to sponsor a debate between the two major candidates for Arkansas' third district congressional seat. The court of appeals nonetheless concluded that the debate "was surely a place opened by the government for a limited class of speakers," which it found included *all* "candidates running for the Third District Congressional seat." Pet. App. 15a. That conclusion has no basis in this Court's First Amendment jurisprudence, is inconsistent with the FCC's longstanding treatment of televised debates under the equal opportunities provision of the Communications Act, and will sharply limit public broadcasters' ability to host debates and to exercise the editorial discretion that is vital to their missions.

A. A Broadcaster's Decision To Sponsor A Debate Between Selected Candidates For Office Does Not Evince An Intent To Create An Open Forum For All Candidates To Express Their Views

The Eighth Circuit's public forum determination rests on two fundamental errors.

First, the court emphasized that AETN is "governmentally owned" and that the selection of debate participants was made by government employees. Pet. App. 5a, 16a. Under this Court's precedents, however, AETN's public nature plainly does not make it, or its programming, a public forum. This Court repeatedly has held that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 115 S. Ct. 2440, 2446 (1995). Nothing in the First Amendment compels "'access to property simply because it is owned or controlled by the government.'" *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (quoting *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)). *Accord Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 301-302 (1974) (plurality opinion).

This Court recently confirmed that government ownership or control of a channel of communication is not dispositive of the public forum question. In *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), the Court held that a government-controlled corporation is a state actor for purposes of First Amendment analysis. It compared Amtrak to the Corporation for Public Broadcasting, noting that the boards of directors of both entities are "controlled by Government appointees." *Id.* at 970. Nevertheless, control of the enterprise by government appointees was not "crucial," as the Eighth Circuit erroneously held, Pet. App. 16a, for in *Lebron* the Court expressed no opinion as to whether a public forum had been created. 115 S. Ct. at 975.[5]

[5] On remand, the Second Circuit held that the particular billboard at issue was a non-forum. *Lebron* v. *National R.R. Passenger Corp.*, 69 F.3d 650, *amended*, 89 F.3d 39 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

Second, the Eighth Circuit emphasized that a televised debate is designed to "'provid[e] a forum for expressive activity.'" Pet. App. 15a (quoting *Cornelius*, 473 U.S. at 805). But this Court's cases make clear that mere creation of a channel of communication does not make a public forum. As with the billboard space at issue in *Lebron*, some property controlled by the Government may have no other purpose than the communication of ideas, *Lebron*, 69 F.3d at 653-654, but "[t]he mere physical characteristics of the property cannot dictate forum analysis." *United States* v. *Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion). If they did, as this Court has observed, "'display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician.'" *Id.* at 726 (quoting *Lehman*, 418 U.S. at 304). *See also Perry*, 460 U.S. at 49 n.9; *Greenburgh Civic Ass'ns*, 453 U.S. at 130 n.6 (although bulletin board in military cafeteria "is specifically used for the communication of information and ideas, * * * such a bulletin board is no more a public forum than are the street corners and parking lots found not to be so at the same military base" (citing *Greer* v. *Spock*, 424 U.S. 828 (1976) (internal quotation marks omitted)).

The current position of the court below is not -- and has never been -- the law. "Not every instrumentality used for communication * * * is a traditional public forum or a public forum by designation." *Cornelius*, 473 U.S. at 803. Consequently, this Court has declined to accord forum status to advertising space on buses, *Lehman*, 418 U.S. at 301-302; mail boxes, *Greenburgh Civic Ass'ns*, 453 U.S. at 128-129; sidewalks adjacent to a post office, *Kokinda*, 497 U.S. at 730; high school student newspapers, *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267-270 (1988); charitable campaign drives in federal offices, *Cornelius*, 473 U.S. at 803; and internal school mail systems, *Perry*, 460 U.S. at 49 n.9, even though all are avenues of communication controlled by the government, either by function or tradition. Most recently, this Court declined to hold that leased and public access channels on cable television systems are governed by

the public forum doctrine, even though such channels clearly involve expressive activity. *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2385, 2388-89 (1996) (plurality opinion).

The relevant question in identifying a limited public forum is not whether the forum is a medium of communication or is government controlled. Rather, the question is whether the government has shown a "'clear intent to create a public forum.'" *Hazelwood*, 484 U.S. at 270 (quoting *Cornelius*, 473 U.S. at 802). The government does not create a limited public forum "by inaction or by permitting limited discourse." *Cornelius*, 473 U.S. at 802. *Accord Perry*, 460 U.S. at 46-47. That selective groups or individuals are permitted to use public property, moreover, "does not transform [it] into a public forum." *Id.* at 47. *Accord Cornelius*, 473 U.S. at 805. Instead, the government must have, "'by policy or by practice,'" intentionally opened the forum "'for indiscriminate use by the general public, or by some segment of the public.'" *Hazelwood*, 484 U.S. at 267 (quoting *Perry*, 460 U.S. at 47).

This Court has identified a variety of factors that reflect the government's intention in this regard, including its practice or policy of allowing or disallowing unrestricted speech in the forum, the characteristics of the property, and, importantly, the government's stated purpose. *Cornelius*, 473 U.S. at 802-806. Analysis of the government's intent also depends on the role it is performing in a particular case. Where, as here, the government acts "as a proprietor, managing its internal operations," rather than "as [a] lawmaker with the power to regulate or license," its actions are subject to lesser scrutiny. *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). *Accord Kokinda*, 497 U.S. at 725 (citing *Cafeteria & Restaurant Workers, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961)). In such cases, the Court has repeatedly found that a limited public forum has not been created. *See, e.g., Lehman*, 418 U.S. at 303-304; *Perry*, 460 U.S. at 47. *See also Lebron*, 69 F.3d at 657.

In light of these settled standards, it is obvious that a broadcast station's decision to invite certain candidates to participate in a televised debate does not open a limited public forum in which all candidates must be invited to express their views. Broadcast stations are not common carriers,

traditionally open to all speakers. *See* 47 U.S.C. § 153(10) (providing that broadcast stations are not to be deemed common carriers). *See also Denver Area*, 116 S. Ct. at 2383 (distinguishing television broadcasters, which act "like editors," from common carriers such as telephone companies); *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984) (same). Rather, unlike common carriers, broadcasters are licensed by the FCC to exercise "'the widest journalistic freedom consistent with [their] public [duties].'" *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981) (quoting *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973) (*"CBS* v. *DNC"*)).

For this reason, every other court of appeals that has addressed the issue -- including the Eighth Circuit, prior to this case -- has correctly concluded that public television stations and their programs are not public forums under the First Amendment. As the full Fifth Circuit reasoned in *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1042 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023 (1983), "[t]he pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority." Because the public is not given general access to the station, the facility "by definition is not a 'public forum'" and an excluded speaker "is without grounds for challenge under the public forum doctrine." *Id.* at 1043.

Likewise, a broadcaster-sponsored debate is not a limited public forum because the decision to host a debate stems from the broadcaster's journalistic function and not from a desire to provide an "open microphone" for a hypothetical class of beneficiaries. As the Eleventh Circuit concluded in *Chandler* v. *Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991), on facts virtually indistinguishable from those in the present case, the Georgia Public Telecommunications Commission did not intend to open a forum for all candidates when it sponsored debates between the Republican and Democratic candidates for the offices of Governor and Lieutenant Governor. Rather, the public broadcasting commission was performing its function of "'providing educational, instructional, and public

broadcasting services to the citizens of the State of Georgia.'" *Id.* at 488 (quoting Ga. Code Ann. § 20-13-5(a)).

Public broadcaster-sponsored debates thus are not comparable, as the Eighth Circuit erroneously held, Pet. App. 13a, to municipal auditoriums, which may -- or may not -- be opened as designated forums for the unfiltered speech of various speakers. *Compare Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (auditorium was dedicated for expressive activities), *with Calash* v. *City of Bridgeport*, 788 F.2d 80, 83-84 (2d Cir. 1986) (limited access by selected groups does not make municipal auditorium a limited public forum). Nor are they comparable, as the court below suggested, Pet. App. 13a-14a, to university meeting facilities or subsidy programs made broadly available to student groups for their unrestricted expression and association. *See Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Healy* v. *James*, 408 U.S. 169 (1972). As the Eighth Circuit previously concluded, the nature and purpose of a public broadcaster-sponsored debate simply is "'not compatible with unrestricted public access, or even with unrestricted access by a particular class of speakers,'" and therefore cannot be deemed a limited public forum. *DeYoung* v. *Patten*, 898 F.2d 628, 633 (8th Cir. 1990) (quoting *Estiverne* v. *Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989)), *overruled by Forbes* v. *Arkansas Educ. Television Communications Network Found.*, 22 F.3d 1423 (8th Cir. 1994) (en banc).[6]

Under this Court's precedents, the reasoning of *Muir*, *Chandler*, and *DeYoung* is clearly correct. When a public television station stages a debate including only those candidates whose participation, in the station's good faith editorial judgment, will be most valuable to viewers, the station obviously does not intentionally open a forum "'for indiscriminate use'" by every legally qualified candidate, or by any other "'segment of the public.'" *Hazelwood*, 484 U.S. at 267 (quoting *Perry*, 460 U.S. at 46 n.7, 47). In this case, the record clearly demonstrates that AETN did not intend to

[6] *DeYoung* was overruled at an earlier stage of this litigation. Pet. App. 44a.

"open[] its facilities" to all "candidates running for the Third District Congressional seat," as the Eighth Circuit held. Pet. App. 15a. Indeed, the station's good faith editorial decision to include only the major-party candidates demonstrates the contrary. The lower court's public forum determination accordingly has no basis in either law or fact and should be reversed.

B. The FCC's Longstanding Interpretation Of The Communications Act's Equal Opportunity Requirement Confirms That A Broadcaster's Selection Of Debate Participants Is A Legitimate Exercise Of News Judgment

The conclusion that a public broadcaster's selection of debate participants is an exercise of traditional journalistic discretion -- and thus does not create a public forum -- finds additional support in the FCC's treatment of debates under the equal opportunities provision of the Communications Act of 1934, as amended. 47 U.S.C. § 315(a). For more than twenty years the FCC has held, with judicial approval, that candidate debates are "news events" exempt from the equal opportunities requirement.

Section 315(a) obliges broadcasters to make their facilities available to all legally qualified candidates for a given office if they have allowed one such candidate to appear. In 1959 the Commission ruled that the appearance of the incumbent mayor of Chicago on a local newscast triggered equal opportunities for his opponents in a reelection campaign. *Telegram to CBS, Inc. (Lar Daly)*, 18 Rad. Reg. 238 (1959). Congress, fearing that this ruling would deter broadcasters from presenting political news coverage, responded immediately by amending the statute to exempt four categories of news coverage from the equal opportunities requirement: "(1) bona fide newscast[s], (2) bona fide news interview[s], (3) bona fide news documentar[ies], * * * [and] (4) on-the-spot-coverage of bona fide news events." 47 U.S.C. § 315(a)(1)-(4). *See Fox Broad. Co.*, 11 F.C.C.R. 11,101, 11,107-11 (1996) (discussing history of exemptions).

Although the FCC initially interpreted the exemptions narrowly, since 1975 it has held consistently that television coverage of candidate debates qualifies as "on-the-spot coverage of bona fide news events" exempt from the equal

opportunity rule. *See Aspen Inst. Program on Communications & Soc'y*, 55 F.C.C.2d 697 (1975), *aff'd sub nom. Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976). *Accord Ross Perot*, 11 F.C.C.R 13,109, 13,116 (1996). In 1983, the Commission specifically extended the exemption to broadcaster-sponsored debates. *Henry Geller*, 95 F.C.C.2d 1236, *aff'd sub nom. League of Women Voters* v. *FCC*, 731 F.2d 995 (D.C. Cir. 1983). It reasoned that the identity of a debate's sponsor does not affect the program's news value and that, because "a broadcaster may be the ideal, and perhaps the only, entity interested in promoting a debate between candidates for a particular office, especially at the state or local level," exempting broadcaster-sponsored debates "should serve to increase the number of such events, which would ultimately benefit the public." *Id.* at 1244-45.

The Commission will not interfere with a broadcaster's decision to invite only some legally qualified candidates to participate in a candidate debate, so long as the decision is based on the broadcaster's "'good-faith news judgment.'" *King Broad. Co.*, 6 F.C.C.R. 4998, 4999 (1991) (quoting *Kennedy for President Comm.*, 77 F.C.C.2d 964, 969, *aff'd*, *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417 (D.C. Cir. 1980)). The Commission, moreover, "places considerable reliance on the exercise of a broadcaster's journalistic discretion to determine [a program's] 'newsworthiness.'" *Id.* "'[A]bsent evidence of broadcaster intent to advance a particular candidacy, the judgment of the newsworthiness of an event is left to the reasonable news judgment of professionals.'" *Kennedy for President Comm.*, 636 F.2d at 427 (quoting *Chisholm*, 538 F.2d at 359).

Applying these principles, the Commission has repeatedly sustained both public and private broadcasters' decisions to limit debate participation to the major candidates in a campaign when candidates were selected based on the broadcasters' good faith judgment as to their newsworthiness. *See, e.g., Jim Trinity*, 7 F.C.C.R. 3199 (1992) (upholding public television station decision to exclude candidate from Republican senatorial debate where candidate was behind in polls and failed to "demonstrate that the participating candidates were not chosen on the basis of their

newsworthiness"). *Accord John W. Spring*, 1 F.C.C.R. 589, 590 (1986) (upholding commercial radio station decision to air debate on talk radio show among Republican senatorial candidates although six qualified candidates were excluded); *Cyril E. Sagan*, 1 F.C.C.R. 10 (1986) (upholding noncommercial television station decision to exclude candidate from Democratic senatorial debate based on candidate's low standing in public opinion poll).[7]

In short, two decades of Commission and judicial precedent interpreting the Communications Act confirm that the "common denominator" of broadcasters' decisions to sponsor debates, to determine their format, and to limit participation to selected candidates is "bona fide news value." *Henry Geller*, 95 F.C.C.2d at 1244.[8] Thus, under federal

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[7] *See also Ross Perot*, 11 F.C.C.R. at 13,116 (Reform Party candidate's exclusion from debate sponsored by Commission on Presidential Debates to be broadcast by commercial television networks did not trigger equal opportunity requirement); *Arthur R. Block, Esq.*, 7 F.C.C.R. 1784, 1785 (1992) (equal opportunity requirement not triggered by exclusion of legally qualified presidential candidate from debate produced by McNeil/Lehrer Productions to be aired on PBS stations because candidate failed to present "objective evidence," such as polling data, "sufficient to demonstrate that she [wa]s a major presidential candidate"); *Mitchell Rogovin, Esq.*, 7 F.C.C.R. 1780, 1781 (1992) (presidential debate sponsored by Democratic National Committee and aired on commercial television station did not trigger equal opportunities for candidate who did "not present[] objective criteria sufficient to demonstrate that he [wa]s a major presidential candidate"); *Carl E. Person, Esq.*, 6 F.C.C.R. 7477 (1991) (upholding exclusion of legally qualified presidential candidate from debates to be aired on commercial stations and PBS); *Lenora B. Fulani*, 3 F.C.C.R. 6245, 6246 (1988) (commercial networks' coverage of presidential debate between major-party presidential candidates did not trigger equal opportunities provision where excluded candidate failed to show that broadcasters' decision "was motivated by bad faith rather than the requisite good faith intent to air what was perceived as a bona fide news event").

[8] Most recently, the Commission also has extended the news exemption to allow public broadcasters to make blocks of time available to selected candidates for office. In *Fox*, the Commission approved a PBS proposal to telecast unmoderated statements by certain presidential candidates selected by such criteria as national

law, a decision to sponsor a debate and determine its participants is an exercise of news judgment, and not an indication of a broadcaster's intention to open its facilities to all legally qualified candidates, as the Eighth Circuit erroneously concluded. The lower court's public forum determination disregards the regulatory regime crafted by Congress and the Commission and mistakenly calls the agency's longstanding policies into question.[9]

C. The Eighth Circuit Holding Will Sharply Limit Public Broadcasters' Sponsorship Of Candidate Debates And Other Political News Coverage

Public broadcast stations play a vital role in bringing candidate debates to the American public. Consistent with their public service mission and journalistic responsibilities, public television and radio stations frequently sponsor and broadcast debates between candidates for local, state, and federal office. For purposes of this litigation, amici surveyed member stations and determined that public broadcasters sponsored and telecast well over three hundred candidate debates during the 1996 election year cycle alone. Such programming significantly enhances the public's knowledge about elections at all levels of government.

The Eighth Circuit ruling, if affirmed, will sharply limit public broadcasters' sponsorship of debates. If, as the court below ruled, public broadcast stations must invite all qualified

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polling data. The Commission concluded that such presentations would not trigger the equal opportunities requirement because there was no "basis to question the good faith news judgment of PBS with respect to its decision to broadcast the event." 11 F.C.C.R. at 11,113. The Commission has also approved programming produced in cooperation with local PBS affiliates that makes free air time available to major candidates in senatorial, congressional, and gubernatorial races. *A.H. Belo Corp.*, 11 F.C.C.R. 12,306, 12,309-10 (1996).

[9] The Commission's interpretation of the Communications Act is not, of course, dispositive of the constitutional issue presented here. Nonetheless, this Court has held that, when evaluating First Amendment claims involving the broadcast media, the Court "must afford great weight to the decisions of Congress and the experience of the Commission." *CBS* v. *DNC*, 412 U.S. at 102.

candidates to participate, there will be a flood of candidates claiming a constitutional right of access. This glut of candidates often will make such programs impractical to produce and inevitably will cause public stations to curtail debates. Thus, the Eighth Circuit's expansion of the public forum doctrine ironically will produce less speech and less public debate on campaign issues -- precisely the opposite of the effect intended by that court. It also is a result contrary to the central purpose of the First Amendment.

Most debate experts agree that including all candidates in broadcast debates is often infeasible because of the sheer number of candidates. *See* Twentieth Century Fund Task Force on Presidential Debates, *Let America Decide* 148 (1995). In 1988, for example, about 280 people filed statements with the Federal Election Commission indicating that they considered themselves to be presidential candidates. Of these, 168 actually declared as candidates, and 23 appeared on the ballot in one or more states. *Id.* Likewise, 23 presidential candidates appeared on state ballots in the 1992 election cycle, and 21 appeared on ballots in 1996. *See Fox*, 11 F.C.C.R. at 11,105 n.10; Federal Election Commission, *1996 Presidential Candidates on the General Election Ballots of Each State and the District of Columbia* (Oct. 18, 1996) <http.//www.fec.gov/96fed/pballots.htm>.

Candidates for offices at other levels of government also abound, and it is a simple matter for unaffiliated candidates to attain ballot status in many jurisdictions. In Tennessee, for example, an individual needs to obtain only *25 signatures* to qualify as a candidate for any office, Tenn. Code Ann. § 2-5-101(b)(1), and in Oklahoma, a candidate need not obtain any signatures at all, but may appear on the ballot after payment of a modest fee. Okla. Stat. Ann. tit. 26, § 5-112 (requiring payment of $750 (U.S. House), $1,000 (U.S. Senate), or $1,500 (Governor)). Many other states have lenient signature

requirements for ballot qualification for local,[10] state,[11] and federal offices.[12]

Not surprisingly, therefore, races among as many as 11 candidates for a single office were not uncommon in 1996. Eleven candidates qualified for the ballot in separate Tennessee and Texas congressional elections; 9 in the New Jersey Senate race; 7 each for the Tennessee Senate race and the Vermont gubernatorial race; and 6 each for senatorial and congressional races in California, Illinois, Iowa, Massachusetts, Michigan, Mississippi, New Jersey, Oregon, and Tennessee. *See 1996 Election Results*, 54 Congressional

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[10] *See, e.g.*, Ark. Code § 7-7-103(d)(1) (10 signatures required to run for municipal office); Idaho Code § 34-708(2)(d) (5 for county office); Ky. Rev. Stat. Ann. § 118.315(2) (100 for county office; 2 for city office); Miss. Code Ann. § 23-15-359(1)(f) (50 for county office); Neb. Rev. Stat. § 32-618(c) (50 for town office).

[11] *See, e.g.*, Idaho Code § 34-708(2)(c) (50 for state legislature); Iowa Code Ann. § 45.1(3), (4) (50 for state house; 100 for state senate); Ky. Rev. St. Ann. § 118.315(2) (100 for General Assembly); Mass. Gen. Laws Ann. ch. 53, § 6 (150 for state representative; 300 for state senate); Miss. Code Ann. § 23-15-359(1)(e) (50 for state legislature); R.I. Gen. Laws § 17-14-7(d), (e) (50 for state representative; 100 for state senate); Vt. Stat. Ann. tit. 17, § 2402(b)(2), (3) (100 for general assembly; 200 for state senate); Va. Code Ann. § 24.2-506(3), (4) (125 for House of Delegates; 250 for Virginia Senate).

[12] *See, e.g.*, Idaho Code § 34-708(2)(a), (b) (500 House; 1,000 Senate); Iowa Code Ann. § 45.1(1), (2) (300 House; 1,500 Senate); Ky. Rev. Stat. Ann. § 118.315(2) (400 House; 5,000 Senate); Miss. Code Ann. § 23-15-359(1)(a), (c) (200 House; 1,000 Senate); R.I. Gen. Laws § 17-14-7(a), (b) (500 House; 1,000 Senate); Utah Code Ann. § 20A-9-502(2)(a)(i), (ii) (100 House; 300 Senate).

In other jurisdictions a candidate can obtain a place on the ballot with signatures from as few as one percent of eligible voters or of the number of voters who participated in a recent election. *See, e.g.*, Alaska Stat. § 15.40.190; Conn. Gen. Stat. Ann. § 9-453d; Del. Code Ann. tit. 15, § 3002(b); Ga. Code Ann. § 21-2-170(b) (for statewide elections); 10 Ill. Comp. Stat. Ann. 5/10-3 (same); Mich. Comp. Laws § 168.590b(2) (same); Minn. Stat. Ann. § 204B.08 subd. 3(a) (same); Nev. Rev. Stat. § 293.200(1)(b); Or. Rev. Stat. § 249.740(1); S.D. Codified Laws § 12-7-1; W. Va. Code § 3-5-23(c).

Quarterly Weekly Report 3250, 3250-57 (1996). No less than 19 candidates ran for governor in New Jersey in 1993. *See Judge Gives All Candidates Right to Ballot Statement*, N.Y. Times, Sept. 11, 1993, at A26.

In such contests, as the Twentieth Century Fund Task Force on Presidential Debates has recognized, opening the door to every qualified candidate "may actually undermine the educational value and quality of debates" and "erode public perceptions of the legitimacy of the debates process." *Let America Decide* at 19, 148. A multiple-candidate debate can impair "the voters' ability to focus sharply on the major candidates and minimize the time available to the major candidates to share their views with the electorate." *Id.* at 19. Moreover, because major-party candidates may refuse to appear on a crowded podium, requiring such a format risks their nonparticipation. *Id.* at 19-20. For these reasons, broadcasters planning to host a debate may well determine that inviting every declared or legally qualified candidate to participate would be not only unmanageable, but also contrary to the public interest.

This is not to suggest that debates including independent or third-party candidates are never newsworthy or in the public interest. A multicandidate debate may well be useful, for example, during primary season when the candidates are largely unknown and the issues in the campaign are only beginning to develop. The point is not that one debate format is always preferable to another. Rather, the decision as to the appropriate format and presentation requires the application of editorial judgment to the particular circumstances of each case. It cannot be made *a priori* by a court.

As discussed above, Congress has long recognized that an absolute right of candidate access to news programs "'would tend to dry up meaningful radio and television coverage of political campaigns,'" *Chisholm*, 538 F.2d at 352 (quoting S. Rep. No. 86-562 at 10 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2564, 2572), because it would require broadcasters to "'assume[] the burden of presenting a parade of aspirants.'" 538 F.2d at 352 n.5 (quoting S. Rep. No. 86-562 at 9, 1959 U.S.C.C.A.N. at 2571). The FCC similarly has extended the equal opportunities exemption to broadcaster-sponsored debates on the ground that a rigid

right of access for all candidates would deter broadcasters from hosting debates. The Eighth Circuit's equal access rule ignores this deterrent effect and jeopardizes future sponsorship of candidate debates by public broadcasters.

Indeed, the Eighth Circuit holding requires public broadcasters to include candidates in their debates in precisely the same circumstances that led Congress to add the news exemptions to Section 315. The holding would force a public broadcaster to invite to its debate a latter-day Lar Daly -- the "perennial candidate" who "created a national furor" when the Commission ruled that he was entitled to equal time by virtue of news coverage of the Mayor of Chicago during a reelection campaign. *Fulani* v. *FCC*, 49 F.3d 904, 908 n.5 (2d Cir. 1995) (internal quotation marks omitted). "Campaigning in an Uncle Sam costume and using the nickname 'America First' in many of the ballots on which he appeared, Daly ran unsuccessfully for more than 40 elections until his death in 1978." *Id.* It is small wonder that some stations would forego debates entirely rather than host an event that so degraded the political process.

This problem is far from speculative. In August 1996, for example, just after the ruling below, the Nebraska Educational Telecommunications Network canceled a scheduled debate between the major-party contenders for the United States Senate due to access demands by less newsworthy candidates. *See* Don Walton, *Senate Debate at Fair Canceled*, Lincoln Journal Star, Aug. 24, 1996 at 1A; *Name on Ballot Not Enough to Qualify For Political Debate* (editorial), Lincoln Journal Star, Aug. 27, 1996, at 4B.

The Eighth Circuit holding, moreover, cannot logically be confined to candidate debates and thus also threatens public broadcasters' coverage of political campaigns generally. If an invitation to two candidates to participate in a debate opens a forum for all, it is difficult to see why a public station's coverage of one candidate on a newscast, or in a news interview or documentary program, does not similarly trigger constitutional access rights for every other candidate. As the *Chandler* court observed, "[t]he values sought to be fostered by the First Amendment [will] be frustrated, not furthered, by the fitting of such harnesses on public television." 917 F.2d at 490.

D. The Eighth Circuit's Public Forum Holding Destroys The Ability of State-Owned Broadcasters And Publishers To Make Necessary Editorial Decisions

Public broadcasters, like their private counterparts, must make editorial decisions on a daily basis. As this Court has recognized, "editing is what editors are for; and editing is selection and choice of material." *CBS* v. *DNC*, 412 U.S. at 124. Any editorial decision "to broadcast one program excludes, for that time, all other programs." *Chandler*, 917 F.2d at 488. The editorial selection of who shall appear on particular programs is a journalistic choice of equal significance. The Eighth Circuit ruling, by giving every legally qualified candidate for office a right of access to a public broadcaster-sponsored debate, effectively destroys broadcasters' ability to make such necessary editorial choices. *Muir*, 688 F.2d at 1042-43. *See also CBS* v. *DNC*, 412 U.S. at 124 (noting that a right of access for political speakers represents an "erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not").

The Eighth Circuit holding, moreover, is not limited to publicly-controlled broadcast stations. It also creates a presumptive constitutional right of access to *any* state-owned or controlled publisher that allows citizens to communicate their views to the public. As the circuit court pointed out, it was immaterial that editorial selections were routine journalistic judgments made in good faith; the "crucial fact" was that the editors were state employees. Pet. App. 16a.

This holding fails to grasp that sound editorial practices cannot coexist with a rule of law that imposes a constitutional right of access on behalf of all speakers in a particular class. For this reason, other courts have routinely rejected claims that government editors have no right to select which articles and advertisements they will choose to publish. *See, e.g., Barnard* v. *Chamberlain*, 897 F.2d 1059 (10th Cir. 1990) (state bar newsletter); *Estiverne*, 863 F.2d 371 (same); *Sinn* v. *The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987) (advertisement in university newspaper); *Avins* v. *Rutgers*,

385 F.2d 151 (3d Cir. 1967) (law review at state university), *cert. denied*, 390 U.S. 930 (1968); *Leeds* v. *Meltz*, 898 F. Supp. 146 (E.D.N.Y. 1995), *aff'd*, 85 F.3d 51 (2d Cir. 1996) (advertisement in school newspaper); *Allston* v. *Lewis*, 480 F. Supp. 328 (D.S.C. 1979), *aff'd*, 688 F.2d 829 (4th Cir. 1982) (bar association newspaper).

As the Fifth Circuit explained in *Estiverne:*

> [T]he Louisiana State Bar Journal, as the trade publication of the Louisiana Bar, * * * serves a narrow, instrumental role. It was not established as an open forum for the expressive activities of the public, or of all members of the Bar. Rather, the invitation is to *submit* articles and advertisements for consideration by the editorial board, within the framework of editorial discretion necessary to fulfill the magazine's purposes. [863 F.2d at 381 (emphasis in the original).]

The court compared the bar journal to the public broadcast stations in *Muir* and concluded that the purpose of the publication "could not be accomplished without the exercise of editorial discretion." *Estiverne*, 863 F.2d at 380 n.12. The Eighth Circuit holding, if affirmed, will severely limit the exercise of journalistic judgment not only by public broadcast stations, but also by all state-owned publishers.

II. EVEN IF DEBATES ARE HELD TO BE LIMITED PUBLIC FORUMS, PUBLIC BROADCAST LICENSEES SUCH AS AETN MAY MAKE REASONABLE JOURNALISTIC CHOICES IN PRESENTING THEM

The government participates in the marketplace of ideas in various ways, including directly, as a speaker, and indirectly, as a platform for the speech of others. As a broadcast licensee, AETN engages in both functions. Even if this Court were to conclude that a limited public forum was created by AETN's sponsorship of a congressional debate, the decision as to the legitimacy of AETN's actions must take into account the controlling principles when government acts as a speaker, as well as the specific context in which it permits the speech of others. *See Denver Area*, 116 S. Ct. at 2383 (First Amendment requires context-specific approach). Here, where

AETN acted as a broadcast licensee with public interest rights and obligations, and where the jury found that it was not engaged in partisan favoritism, this Court should find that its editorial choice was permissible.

A. The Government Is An Important Participant In The Marketplace Of Ideas

Government "speech" takes many forms. Government may speak directly, by conveying factual information, taking a position on a matter of public policy, or criticizing the ideas of others. *See, e.g.*, *Block* v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.) ("We know of no case * * * which * * * suggest[s] that 'uninhibited, robust, and wide-open debate' consists of debate from which the government is excluded" (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964)), *cert. denied*, 478 U.S. 1021 (1986). *See also Meese* v. *Keene*, 481 U.S. 465, 480-482 (1987) (Congress may label foreign films as "political propaganda"); *Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1015-16 (D.C. Cir. 1991) ("We do not see why government officials may not vigorously criticize a publication for any reason they wish"), *cert. denied*, 503 U.S. 950 (1992); *United States* v. *Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989) ("[T]he government speak[s] on behalf of its citizens when it airs advertisements warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or offering methods for AIDS prevention"), *cert. denied*, 493 U.S. 1094 (1990); *Muir*, 688 F.2d at 1050 (Rubin, J., concurring) ("The federal government * * * publishes 'journals, magazines, periodicals, and similar publications' that are 'necessary in the transaction of the public business'" (quoting 44 U.S.C. § 1108)).

In other circumstances, government participates in the marketplace of ideas by subsidizing speech, or by selecting from among various voices. For example, local school boards have "a substantial legitimate role to play in the determination of school library content." *Board of Educ., Island Trees Union Free Sch. Dist.* v. *Pico*, 457 U.S. 853, 869 (1982) (plurality opinion). Education officials must make "sensitive choices" between subjects to be offered and competing areas of academic emphasis, and "a choice of this nature does not run afoul of the First Amendment." *Id.* at 878 n.1 (Blackmun, J., concurring). *Cf. Rust* v. *Sullivan*, 500 U.S. 173, 194

(1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, * * * it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism").

The government, moreover, is deeply involved in the realm of political speech. State laws determine at the outset which candidates may have an official place in the electoral forum,[13] and this Court has held that states have "important interests in limiting places on the ballot to those candidates who demonstrate substantial popular support." *Buckley* v. *Valeo*, 424 U.S. 1, 96 (1976) (per curiam). *See also Timmons* v. *Twin Cities Area New Party*, 117 S. Ct. 1364, 1369 (1997) ("States * * * inevitably must[] enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder"); *Burdick* v. *Takushi*, 504 U.S. 428 (1992) (ban on write-in candidacies upheld); *Storer* v. *Brown*, 415 U.S. 724, 736 (1974) (denial of ballot positions to certain independent candidates upheld because "splintered parties and unrestrained factionalism may do significant damage to the fabric of government"); *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971) ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot").

Even where the government directly subsidizes the political speech of certain candidates, the Constitution does not require that all who achieve ballot status qualify for funding. *Buckley*, 424 U.S. at 96 ("Congress' interest in not funding hopeless candidacies with large sums of public money * * * necessarily justifies the withholding of public assistance from candidates without significant public support" (internal citation omitted)); *American Party of Texas* v. *White*, 415 U.S. 767, 794 (1974) (the government is not required to "finance the efforts of every nascent political group"); *Buckley* v. *Valeo*, 519 F.2d 821, 881 (D.C. Cir. 1975) ("[I]n order to provide public funds for some

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13 *See Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas").

candidates for President, [Congress] is surely not required to provide equal funds for all who declare themselves Presidential candidates"), *aff'd*, 424 U.S. 1 (1976). Thus, even when the government provides support for the political speech of private parties, the Constitution does not require funding for all.

Of course, such participation in the marketplace of ideas is not without constitutional limitations. The government cannot engage in invidious discrimination or impose partisan preferences. *See Rosenberger*, 115 S. Ct. at 2520; *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383-384 (1992); *American Party*, 415 U.S. at 781. *Cf. Pico*, 457 U.S. at 870-871 ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books"). Absent an improper purpose, however, the legitimacy of government's participation in the marketplace of ideas depends on the function it is performing. *Rosenberger*, 115 S. Ct. at 2517 (exclusions from a public forum must be "'reasonable in light of the purpose served by the forum'" (quoting *Cornelius*, 473 U.S. at 806)); *Muir*, 688 F.2d at 1050 (Rubin, J., concurring) ("The function of a state agency operating an informational medium is significant in determining first amendment restrictions on its actions").

B. As A Broadcast Licensee, AETN's Exercise Of Editorial Discretion Is Supported By Public Interest Rights And Responsibilities

AETN is licensed by the federal government to provide broadcast service to further the "public interest, convenience, and necessity," 47 U.S.C. § 309(a), and its actions must be considered in this context. The Communications Act confers certain rights and responsibilities. Any analysis of the various interests involved in AETN's actions "must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century." *CBS.* v. *DNC*, 412 U.S. at 102.

1. The Public Interest Standard Is Grounded In First Amendment Principles

Congress has recognized that broadcasters "are engaged in a vital and independent form of communicative activity," *League of Women Voters*, 468 U.S. at 378, and accordingly has conferred upon licensees broad freedom to make journalistic judgments in the public interest. *CBS.* v. *FCC*, 453 U.S. at 395.[14] In defining the public interest, "Congress specifically dealt with -- and firmly rejected -- the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues," *CBS* v. *DNC*, 412 U.S. at 105, and it "pointedly refrained from divesting broadcasters of their control over the selection of voices." *Id.* at 116 (plurality opinion). For example, Section 326 of the Communications Act prohibits censorship and expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. These policies "were drawn from the First Amendment itself [and] the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS* v. *DNC*, 412 U.S. at 122.

At the same time, broadcast licensees have certain statutory obligations that are not shared by unregulated media, particularly with respect to political speech. Thus, for example, broadcasters must allow "reasonable access" during political campaigns for "legally qualified candidate[s]" for federal office, 47 U.S.C. § 312(a)(7); they must sell advertising time to political candidates at discounted rates, *id.* § 315(b); and, as discussed above, they must provide "equal opportunities" for candidate appearances where an opponent has used the broadcast facilities, *id.* § 315(a).

This Court has characterized the need to implement public interest obligations in a manner consistent with licensees' editorial independence as "a task of a great delicacy and difficulty" *CBS* v. *DNC*, 412 U.S. at 102, and has found that such requirements "must be viewed in the context of [the

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[14] Broadcast regulation evolved from "a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." *CBS* v. *DNC*, 412 U.S. at 109.

broadcaster's] journalistic role." *Id.* at 118 (plurality opinion).[15] Thus, as described above, for over twenty years the FCC and the courts have relied on licensees' bona fide news judgments in sponsoring political debates. On the other hand, this Court has upheld "reasonable access" requirements. *CBS* v. *FCC*, 453 U.S. 367. This approach, which emphasizes the importance of editorial independence, preserves the balance established in the Communications Act and is consistent with First Amendment principles.

2. The Same Public Interest Principles Apply With Equal Force to State-Owned Broadcast Licensees

This Court and the FCC have confirmed that public and private licensees should have the same ability to exercise editorial control under the public interest standard. *See Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 650-651 (1994); *League of Women Voters*, 468 U.S. at 394. *Accord Community-Service Broad. of Mid-America, Inc.* v. *FCC*, 593 F.2d 1102, 1108-09 (D.C. Cir. 1978) (en banc); *Muir*, 688 F.2d at 1040. *See also City of New York Mun. Broad. Sys.*, 56 F.C.C.2d 169, 170 (1975) (rejecting argument that the public forum doctrine precludes governmentally-owned broadcast licensees from exercising the editorial independence granted by the Communications Act).

In *League of Women Voters*, this Court invalidated on First Amendment grounds a statutory prohibition against public broadcast stations (including state-owned licensees[16]) airing editorials.[17] The purported concern of the respondent in that

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[15] Accordingly, this Court has noted that the concept of free expression embodied in the public interest standard is "'not that everyone shall speak, but that everything worth saying shall be said.'" *CBS* v. *DNC*, 412 U.S. at 122 (quoting Alexander Meiklejohn, *Political Freedom* 26 (1948)).

[16] The Court noted that at least two-thirds of public television stations are licensed to state public broadcasting authorities or commissions, whose members are often appointed by the governor; state universities or educational commissions; or local governments. *League of Women Voters*, 468 U.S. at 393 n.22.

[17] Although possible, it is not necessary to articulate a constitutional basis for AETN's editorial independence. As noted above, the public interest standard of the Communications Act

case was the same as that expressed here by the court below -- that editorial judgments cannot be entrusted to "employees of government." Pet. App. 16a. *See* 468 U.S. at 393 ("The Government * * * suggest[s] that the source of governmental influence may well be state and local governments, many of which have established public broadcasting commissions that own and operate local noncommercial educational stations"). This Court nonetheless found that Congress "imposed no special requirements to restrict state or local control * * *, and, indeed, it ensured through the structure of the Act that these stations would be as insulated from federal interference as the wholly private stations." *Id.* at 394. It expressly relied on the balance of interests created by the Communications Act, reasoning that "the public's interest in preventing public broadcasting stations from becoming forums for lopsided presentations of narrow partisan positions is already secured by a variety of other regulatory means that intrude far less drastically upon the 'journalistic freedom' of noncommercial broadcasters." *Id.* at 397-398 (quoting *CBS* v. *DNC*, 412 U.S. at 110).[18]

Compared to commercial licensees, moreover, public broadcasters generally have added protections against

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embodies First Amendment values but confers statutory rights. *See, e.g., Muir*, 688 F.2d at 1041. Thus, in *Syracuse Peace Council* v. *FCC*, 867 F.2d 654, 659-660 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990), the D.C. Circuit found that the constitutional and statutory values of editorial independence are coextensive and upheld a Commission decision to eliminate the fairness doctrine solely on statutory grounds. *See id.* at 658-659 (judgment that the doctrine "'results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists'" did not require a First Amendment finding and could be upheld entirely under the public interest standard (quoting *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5052 (1987)).

[18] In *Turner*, the Court confirmed that noncommercial stations "are subject to no more intrusive content regulation than their commercial counterparts." 512 U.S. at 650. "'The FCC itself has recognized that 'a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of stifling the creativity and innovative potential of these stations.'" *Id.* at 651 (quoting *Public Broad.*, 98 F.C.C.2d 746, 751 (1984)).

partisanship through structural requirements in the Public Broadcasting Act. *See id.* at 386-388.[19] At the state level, AETN is chartered "for the purpose of making the benefits of educational television available to and promoting its use by inhabitants of Arkansas." Ark. Code Ann. § 6-3-105(a). AETN's editorial judgments regarding news and campaign coverage are also governed by the Statement of Principles of Editorial Integrity in Public Broadcasting -- to which the vast majority of government-affiliated licensees subscribe -- and by its own established programming policy statements. Pet. App. 64a, 82a, 96a; Tr. 186-197. Under established policy, AETN maintains its independence "by shielding the program[ming] process from improper political pressure" and by basing each programming choice "on its value in the marketplace of ideas." *Id.* at 189-190.

C. AETN's Editorial Choice In This Case Should Be Upheld

Viewed in the context of its public interest rights and obligations as a broadcast licensee, AETN's news judgment concerning its congressional debate was reasonable and should be upheld. The state government in this case is not acting as a licensing body, determining which speakers may appear in a public park. Instead, as another Eighth Circuit panel recently observed in a case involving similar facts, AETN is "a government agency which is also a media organ" that, "[b]y its very nature and under controlling policies, * * * *must* be concerned with the newsworthiness of the issues and speakers included in its programming." *Marcus* v. *Iowa Pub. Television*, 97 F.3d 1137, 1142 (8th Cir. 1996) (emphasis in original).

The *Marcus* decision well illustrates the significance of this point. There, the court found that public broadcasters may

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[19] The Act was adopted to "facilitate the development of public telecommunications and to afford maximum protection to such broadcasting from extraneous interference and control." 47 U.S.C. § 396(a)(10). *See also id.* at § 396(c)-(f) (establishing a bipartisan structure for the Corporation for Public Broadcasting); *id.* § 396(f)(3) (prohibiting political contributions); *id.* § 396(k)(6)(A)-(B) (establishing objective criteria for grants to be used at the discretion of local licensees).

limit debate invitations to certain candidates because "'newsworthiness' is peculiarly a decision within the domain of journalists," and it concluded that the state television licensee in that case had "a compelling interest, in meeting its public service goals, of limiting access to newsworthy candidates." *Id.* at 1142, 1144. The same findings apply with equal force here.

The reasonableness of AETN's decision is also underscored by the fact that less newsworthy candidates for federal office, such as Forbes, have a statutory right of "reasonable access" to air time on AETN. 47 U.S.C. § 312(a)(7); *Political Programming Policies*, 7 F.C.C.R. 678, 681 (1991). Moreover, since public television stations do not sell advertising, such time is provided without commercial time charge, unlike the access time provided on commercial stations.

Forbes may complain that such access does not put him on an equal footing with candidates who appear in debates, but equality is not required. *Buckley*, 424 U.S. at 97-98 ("'Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike'" (quoting *Jenness*, 403 U.S. at 441-442)). As this Court recently noted, "[m]any features of our political system * * * make it difficult for third parties to succeed in American politics." *Timmons*, 117 S. Ct. at 1371. Where a candidate has exerted little effort, has no staff or public support, has raised few funds and has attracted little public attention, it is not reasonable to demand that the government level the playing field by altering its election laws, subsidizing his campaign or, as here, placing him on a debate platform with major-party candidates. *See Buckley*, 424 U.S. at 98 ("Identical treatment of all parties * * * would also artificially foster the proliferation of splinter parties" (internal quotation marks omitted)).

The Eighth Circuit seemed to be concerned that a state-owned broadcaster would deliberately attempt to influence the outcome of an election by not allowing those with whom it disagreed to debate. Such concern is unfounded in this and other cases for two reasons. First, there is no question as to AETN's motives in this case: the jury specifically found that the decision to invite the major-party candidates was not

based on political favoritism or on disagreement with Forbes' views. Pet. App. 4a, 22a-23a.

Second, this is the type of factual issue that the FCC is uniquely qualified to face and decide. It has been doing so for years. Broadcast licensees who engage in political favoritism risk fines and even loss of their licenses. *See, e.g., WPRY Radio Broadcasters, Inc.*, 40 F.C.C.2d 1183, 1193-1200 (1973) (license renewal denied and fine imposed where part owner of station who was also a candidate used station to advance his own candidacy and to discriminate against others in the race); *WANV, Inc.*, 54 F.C.C.2d 432 (1975) (station fined for discriminating between candidates); *Western Connecticut Broad. Co.*, 43 F.C.C.2d 730 (1973) (station fined for requiring all candidates in a race -- except the Republican -- to submit in advance scripts for political announcements).

If equal access for political candidates to public broadcaster-sponsored debates is constitutionally required, there is "no principled basis upon which that rule could be limited to the candidate who has obtained a ballot position and not extended to all other serious candidates." *Chandler*, 917 F.2d at 489. The decision below vividly demonstrates the lack of intelligible standards predicted in *Chandler*, especially when considered in light of the subsequent *Marcus* ruling. The *Forbes* court initially defined the class of speakers qualifying for a right of access as including "legally qualified candidates." Pet. App. 15a. It further noted the political success of some write-in candidates and stated that whether a candidate is viable "ultimately [is] a judgment to be made by the people of the Third Congressional District." *Id.* at 16a-17a. Nevertheless, as evidence of the notion that "[p]olitical viability is a tricky concept," *id.* at 17a, the court subsequently modified its holding to exclude certain debates and candidates. *See Forbes* v. *AETN*, No. 95-2722 WAFS (Sept. 26, 1996) (deleting access requirements for "write-in candidates" and for debates "organized by people or groups other than the defendants") (J.A. 12-13).

The journalistic judgments relied upon in both *Chandler* and *Marcus* provide a far more solid basis for deciding which candidates should be included in candidate debates on public television stations than does the holding in *Forbes* that

sweeps in some poorly defined subset of legally qualified candidates. As the *Marcus* court observed, "professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges." 97 F.3d at 1144.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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